Brooks, Becky

From: Elizabeth O'Neal <oneale@socma.com>
Sent: Friday, October 18, 2013 3:03 PM
To: Elizabeth O'Neal
Subject: EO 13650 Implementation Comments
Attachments: Working Group Comments.pdf; SOCMA CFATS Statement.pdf

Hello,
SOCMA has just provided these comments to the EO 13650 working group.
We wanted to forward a copy to you, directly.
Thank you,
Elizabeth O'Neal

C. Elizabeth O'Neal, MPA
Senior Manager, Government Relations
Society of Chemical Manufacturers and Affiliates
1850 M Street NW
Washington, DC 20036
(202) 721-4198
@elizabeth_oneal
www.linkedin.com/in/ceopublicaffairs/
www.SpecialtyManufacturing.org
www.socma.com/governmentrelations

SOCMA
Society of Chemical Manufacturers & Affiliates

February 11, 2011

The Honorable Dan Lungren
Chairman
Subcommittee on Cybersecurity,
Infrastructure Protection, and Security
Technologies
H2-176 Ford House Office Building
Washington, DC 20515

The Honorable Yvette Clarke
Ranking Member
Subcommittee on Cybersecurity,
Infrastructure Protection, and Security
Technologies
H2-117 Ford House Office Building
Washington, DC 20515

Re: Subcommittee Hearing on "Preventing Chemical Terrorism: Building A Foundation of Security At Our Nation's Chemical Facilities"

Dear Chairman Lungren and Ranking Member Thompson:

On behalf of the members of the Society of Chemical Manufacturers and Affiliates (SOCMA), I would like to share with you our perspective on the subject of your hearing this week, the Chemical Facility Anti-Terrorism Standards (CFATS).

Working in a bipartisan manner, Congress enacted a strong chemical security regulatory program in late 2006. It was the sustained effort over a two-year period by the House Homeland Security Committee and the Senate Homeland Security and Government Affairs Committee that drove that legislation. Thanks to this leadership, the U.S. Department of Homeland Security (DHS) was finally able – six years after 9/11 – to initiate a regulatory program to assure the security of the nation's vital chemical sector. DHS and regulated facilities are still deep in the middle of implementing these Chemical Facility Anti-Terrorism Standards (CFATS) in a focused, cooperative manner. On behalf of the most innovative component of the chemical sector, SOCMA appreciates the interest that the Subcommittee is showing in the CFATS program by holding this hearing so early in the 112th Congress.

SOCMA strongly supports DHS's current CFATS program. This demanding program is now requiring over almost five thousand chemical facilities nationwide to develop and deploy meaningful security enhancements. Equally important, it has led over 2,000 facilities to voluntarily take steps reduce their risk profile sufficiently that they no longer warrant regulation under the program. This performance-based regulation protects facilities against attack without impairing the industry's ability to remain innovative and maintains some of the nation's highest paid jobs in the manufacturing sector.

While CFATS has had bumps in the road like any other regulatory program, it is working well and making the Nation safer for all Americans. Congress can best assure the program's success and continued forward momentum by passing a three-to-five year extension of the current authorization without making any other changes.

I. SOCMA and the Current State of Chemical Facility Security

A. SOCMA

SOCMA is the leading trade association representing the batch, custom, and specialty chemical industry. SOCMA's nearly 300 member companies employ more than 100,000 workers across the country and produce some 50,000 products – valued at $60 billion annually – that make our standard of living possible. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products. Over 80% of SOCMA's active members are small businesses.

ChemStewards® is SOCMA's flagship environmental, health, safety and security (EHS&S) continuous performance improvement program. It was created to meet the unique needs of the batch, custom, and specialty chemical industry, and reflects the industry's commitment to reducing the environmental footprint left by members' facilities. As a mandatory requirement for SOCMA members engaged in the manufacturing or handling of synthetic and organic chemicals, ChemStewards is helping participants reach for superior EHS&S performance.

B. SOCMA's Security Achievements To Date

Maintaining the security of our facilities has always been a priority for SOCMA members, and was so before September 11. After the tragic events of 9/11, SOCMA members did not wait for new government regulations before researching, investing in and implementing additional and far-reaching facility security measures to address these new threats. Under the ChemStewards initiative, SOCMA members were required to conduct security vulnerability assessments (SVAs) and to implement security measures.

SOCMA designed an SVA methodology specifically for batch, custom and specialty chemical facilities that was approved by the Center for Chemical Process Safety (CCPS) as meeting its requirements for an effective methodology. SOCMA members have spent billions of dollars and have devoted countless man-hours to secure their facilities and operations. These investments will naturally continue for the foreseeable future.

Many (though by no means all) SOCMA member company facilities are encompassed by the CFATS program. These facilities have completed their Site Security Plans (SSPs) and are being (or will soon be) inspected by DHS to verify the adequacy of those plans and their conformance to them. SOCMA is actively engaged with DHS to accelerate and continuously improve the implementation of the CFATS program, collaborating on new approaches to personnel surety and Alternative Security Programs.

Many of our member companies' other facilities comply with the Coast Guard's facility security requirements under the Maritime Transportation Security Act (MTSA).

Looking well beyond regulatory requirements, our members have also partnered with DHS on many important voluntary security initiatives and programs through the years, including the Risk Assessment Methodology for Critical Asset Protection (RAMCAP), the Buffer Zone Protection Plans, and the Homeland Security Information Network (HSIN). SOCMA is a founding member of the Chemical Sector Coordinating Council, which has served as a model for how critical infrastructure sectors should work together and with DHS.

SOCMA also works jointly with DHS in organizing a free annual Chemical Sector Security Summit and Expo that brings together government representatives, chemical security experts, and industry professionals to share knowledge and best practices.

Through the Sector Council and other avenues, we and our members have developed close and open working relationships with DHS and other federal agencies, and with state and local governments, to exchange information and coordinate roles in maintaining the security of our critical chemical facility infrastructure.

C. Preserving the Progress Under CFATS

While we will leave a detailed progress report on the CFATS program to DHS, SOCMA wants to emphasize that we regard the program thus far as a success. Due to the outstanding cooperation of the chemical sector, there has been 100% compliance with the requirements to submit Top-Screens, SVAs and SSPs – DHS has not yet had to institute a single administrative penalty action to enforce compliance. And as noted earlier, over 2,000 facilities – over a quarter of the preliminarily tiered facilities- have changed processes or inventories in ways that have enabled them to screen out of the program. Thus, as predicted, CFATS is driving facilities to reduce inherent hazards, where in their expert judgment doing so is in fact safer, does not transfer risk to some other point in the supply chain, and makes economic sense.

To fully gauge the effectiveness of the CFATS program, Congress should allow it to be fully implemented – for all tiered facilities to fully come into compliance. Completing the program's implementation from start to finish would provide DHS and chemical companies the ability to assess the overall efficacy of CFATS, identify its areas of strength and weakness, and subsequently make (or recommend to Congress) any necessary improvements.

Conversely, the need for annual reauthorization of the program has created uncertainty for the chemical industry, which is making large financial investments in tools and technology in order to comply with the current CFATS standards. Without the assurance of a long-term authorization of chemical security regulations, companies run a risk of investing in costly activities today that might not satisfy regulatory standards tomorrow.
With statutory authority for CFATS set to expire March 4 of this year, Congress must act now to ensure continuation of the current standards and reauthorize the underlying statute for another three to five years.

II. Lessons From the 111th Congress

In 2009, Senate Homeland Security and Government Affairs Committee Ranking Member Collins introduced S.2996, the "Continuing Chemical Facilities Antiterrorism Security Act of 2010," together with Senators Pryor, Voinovich, and Landrieu. This bill would have reauthorized the CFATS program until 2015, thus allowing DHS and facilities to remain focused on successfully implementing that program as quickly as possible. SOCMA strongly supported Senator Collins' legislation.

The House took a very different approach than the Senate, passing a largely partisan bill (H.R.2868) by a vote of 230-193 with no support from then-minority Republican members – not a single vote in favor. That bill included provisions that are fundamentally unwise and potentially counterproductive to our shared goal of preventing terrorist incidents at chemical facilities.

H.R.2868 was approved despite testimony from numerous witnesses who shared strong concerns regarding these provisions, particularly a requirement that facilities implement so-called "inherently safer technology" (IST) in their processes. This mandate would have shifted DHS's focus from securing our industry against terrorism to conducting engineering and chemistry assessments, while potentially phasing out legitimate products that improve our daily lives and enhance our safety. The House-approved bill would have jeopardized the progress that industry and DHS have made together thus far under CFATS.

The Senate Homeland Security and Governmental Affairs Committee shared our industry's concern. During a markup of H.R. 2868, the bill's text was substituted with Ranking Member Susan Collins' chemical security legislation, S. 2996, which did not include the controversial IST provision. The Committee approved the substituted language by unanimous consent, but the full Senate did not have the opportunity to vote on it by the end of the last Congress. In the end, Congress extended authorization for the current CFATS program via the continuing resolutions that have funded the government for this fiscal year.

III. Mandatory IST Is an Inherently Risky Proposition

SOCMA vehemently believes that this Congress should enact legislation like that reported last year in the Senate, thus extending the CFATS program for three to five years. Congress should not devote any further time to discussing the discredited concept of mandatory IST. The balance of this statement explains in significant detail why mandatory IST would be so unwise.

An IST mandate such as that contained in last year's House bill would have amended Section 2111 of the CFATS statute to require Tier 1 and 2 facilities to implement "methods to reduce the consequences of a terrorist attack" – i.e., IST – whenever DHS made specified findings about risk reduction and technical and economic feasibility. However commonsense such a mandate might appear on the surface, it is fundamentally a bad idea in the security context. Inherent safety is a superficially simple but truthfully very complex concept, and one that is inherently unsuited to regulation. Any IST mandate is bound to create situations that will *actually increase*

or transfer overall risks. It would also wreak economic havoc on regulated facilities, notwithstanding the findings DHS would have to make. Makers of active pharmaceutical ingredients, common fuels and other federally-regulated substances would be most at risk of such economic damage.

A. What Inherent Safety Really Is and Why Mandating It Is Not Inherently Better

First and foremost, it is important to clarify a common misunderstanding about inherent safety. Quite simply, IST is a process-related engineering concept, not a security one. It is premised on the belief that, if a particular chemical process hazard can be reduced, the overall risk associated with that process will also be reduced. In its simplicity, it is an elegant concept, but the reality is almost never that simple. A reduction in hazard will reduce overall risk if, and only if, that hazard is not displaced to another time or location, or result in the creation of some new hazard.

Inherent safety is only successful if the sum total of all risks associated with a process life cycle is reduced. This is rarely a simple calculation, and to some extent it is an irreducibly subjective one (for example, a substitute chemical that may reduce explosion risks may also pose chronic health risks).

The calculation becomes even more difficult when it is being done not solely for reasons of process safety (where accident probabilities can be estimated with some degree of confidence) but also for reasons of security (where the probability of terrorist attack is highly uncertain but certainly low). There is no agreed-upon methodology to measure whether one process is inherently safer than another process – something DHS's Science & Technology Directorate is attempting to address – in a multi-million dollar, multi-year process that may or may not succeed. This is why the world's foremost experts in IST and chemical engineering consistently recommend against regulating inherent safety for security purposes.

Here are several examples of how difficult it can be to reduce overall risk when attempting to reduce hazard:

Eliminating the use of a hazardous catalyst
A chemical company wants to eliminate the use of a hazardous catalyst, which is typically used in small amounts. The catalyst serves as a booster to start a chemical reaction to make a building block for a drug used to treat cancer. Catalysts tend to be hazardous by nature, which reduces the number of available alternatives. The only way the company can initiate the reaction without using a hazardous catalyst is to increase the temperature and pressure of the system. The overall risk of the new system, aggravated by increasing the temperature and pressure, may actually be greater than the risk associated with use of the catalyst, because catalysts are typically used in small amounts and the likelihood of an accident is remote.

Reducing the amount of a chemical stored on site
A manufacturing plant is considering a reduction in the volume of a particular chemical stored on site. The chemical is used to manufacture a critical nylon additive, which is sold to another company and used to make seat belts stronger. Because it is a critical component for nylon strength and seatbelt production cannot be disrupted, the production schedule cannot change. If

the amount stored on site is reduced, the only way to maintain the production schedule is to increase the number of shipments to the site. This leads to more deliveries (an increase in transportation risk) and more transfers of chemical from one container to another (an increase in transfer risk). Economic risks are also increased since there is now a greater chance that production could be disrupted by a late shipment.

How location and individual circumstance affect risk perception
It is difficult to describe a scenario in which moving a hazard does not result in a simple transfer of risk from one location to another. For example, location can highlight different risk perspectives, such as the use of chlorine, a hazardous gas that comes in various types of containers. A commonly used example compares the inherent safety of a rail car, which typically holds up to 90 tons, versus storage in one-ton cylinders. Residents near the facility would probably view the one-ton cylinder as inherently safer than a rail car.

On the other hand, workers who have to connect and disconnect the cylinders 90 times, instead of just once for the rail car, would probably consider the rail car inherently safer.

B. IST's Impact on Pharmaceuticals and Microelectronics

One of SOCMA's greatest concerns with IST is the real possibility that it will negatively restrict the production of active pharmaceutical ingredients (APIs), many of the key raw materials of which are included on DHS's Appendix A of covered chemicals. APIs are used in prescription and generic drugs, life saving vaccines and over-the-counter medicines. They are thoroughly regulated by the FDA and must meet demanding quality and purity requirements. Substituting chemicals or processes used for the production of APIs would likely violate the conditions of their FDA approvals. Requiring IST could delay clinical trials while new replacement chemicals are identified or invented, and would force API manufacturers and their customer drug manufacturers to reapply for FDA approval of their products because of the significant change in the manufacturing. The lengthy one to four year approval timeline for a new or equivalent replacement chemical would be a high price to pay for American consumers, many of whom rely on ready access to pharmaceuticals. To meet continuing consumer demand, API production would likely shift to foreign countries, where the FDA is less able to monitor conformance to quality standards.

Many SOCMA members' products are also vital to the manufacture of microelectronics. Below, we offer several examples, provided by SOCMA members, of how IST could cripple the pharmaceutical and microelectronics industries.

Lifesaving Antibiotics: Company A
Company A is a minority-owned small business regulated by DHS under CFATS. It produces an active pharmaceutical ingredient critical to specific antibiotics used in the treatment of a life-threatening bacterial infection. For this purpose, the company is also regulated by the FDA. Since the product's specifications are likely not to be attainable via any chemical substitution or altered process, if a "safer" manufacturing process alternative was mandated, the company would likely be forced to discontinue production, lay off workers and increase our nation's vulnerability to bacteriological threats. The impact of a mandatory alternative would thus be swift and direct.

Common Pain Reliever: Company B
Company B manufactures the active pharmaceutical ingredient Ibuprofen. Ibuprofen is a non-steroidal anti-inflammatory drug (NSAID) used to treat pain and relieves symptoms of arthritis such as inflammation, swelling, stiffness, and joint pain. It is one of the world's most successful and widely-used pain relievers, and is listed on the World Health Organization's model list of medicines.[1] Changing the raw materials, and consequently the process, used to manufacture it presents a risk to public health and a substantial cost for re-qualification from a technical, regulatory, and potentially clinical perspective.

Company B's 32-year old process to manufacture Ibuprofen bulk active is well characterized and controlled, and consistently makes a safe and efficacious product. The process-characteristic impurity profile, specified under the prevailing USP and European Pharmacopoeia compendia, is proven to have no impact to public health by its use by millions of people worldwide. The costs derived from IST, if it impaired production quantities or product quality, would ultimately be felt by consumers.

Microelectronics: Company C
Company C manufactures two Appendix A chemicals of interest targeted by industry critics. First, Company C uses small amounts of hydrochloric acid (HCl) in a very high purity, aqueous form (37%) to manufacture a product that represents almost half of the company's revenue worldwide (~$30 million/yr). The product is used in the microelectronics industry to manufacture integrated circuits and LCD displays. If HCl were not available, Company C would be unable to make its largest product, resulting in at least a 50% reduction in workforce, which would equate to losing 60 jobs. If the company chose to continue the business, alternatives would have to be developed and implemented to continue manufacture of those products, which could easily require billions of dollars of research, development and implementation, resources that small companies like Company C, which include many of SOCMA's members, do not have. Additionally, Company C uses HCl to protect the environment: its use brings the pH of the company's wastewater into the range dictated by its wastewater permit.

The company also uses small volume products using aqueous (49%) hydrofluoric acid (HF) that are sold into the microelectronics industry. Customers of Company C that need HF for their products require Company C to undergo specific certification standards as a product supplier. If Company C was forced to use a substitute, it would immediately be out of compliance with its customers' product standards, which (obviously) would negatively impact Company C's business. In some cases, the HF is being used as a safer alternative to replace hydroxylamine (HA), the use of which has been reduced due to the multiple explosions at HA manufacturing facilities. In some cases, anhydrous HF may be necessary as water may be incompatible with the manufacturing process. If manufacturers of microelectronics were denied a supply of HF, there would be a negative consequence to the domestic manufacturing of integrated circuits and LCD displays.

The Energy & Commerce Committee's 2009 report on H.R. 2868 attempted to assuage concerns like those just discussed, opining that, where mandated IST "could result in a product that is less effective or less available to those who need it," or "forced the company to seek new regulatory

[1] World Health Organization, WHO Model List of Essential Medicines (March 2005).

approvals (such as from the Food and Drug Administration) that could take years to obtain, that could mean that the covered facility could not continue its business" and "the Department must consider such unintended consequences."[2] Respectfully, SOCMA's concerns cannot be alleviated by such non-binding language. Not only would DHS not be required to follow it, but DHS would also be free to conclude that the amount of delay required to get an FDA approval, or the degree to which the effectiveness of a product would be diminished, would *not* mean that the facility could not continue its business. After all, a sufficiently large and flexible facility might well be able to stay in business even though it has lost an important product or market. But this subcommittee should not be encouraging the destruction of products and markets for questionable benefits in this economy (or any other).

C. IST's Impact on Jobs

It goes without saying that process or product changes will have a negative impact on the jobs at facilities forced to make these changes. There are multiple pressures on SOCMA's members, not just whether there is a market that can afford to purchase what they produce or whether they can compete with the lower wages and resource costs in foreign countries. Chemical manufacturers are required to comply with many state, local, and federal regulations. Regulatory requirements cost money, money that is used to hire workers, train them, to innovate, develop new products and to provide healthcare to them. The chemical industry is one of the most regulated industries in the United States. Spending money to comply with new regulations necessarily causes companies to assess how they will pay for it. There isn't much available capital these days for manufacturers to take on new regulations aimed at their very livelihood, especially small manufacturers.

Because they lack the economies of scale and resources of larger companies, small businesses will be the most vulnerable to the IST provisions of the House bill. The unintended consequences of this provision will not only affect chemical manufacturers, but also resonate throughout their value chain. Since the economic downturn, small businesses have been hit hard by the economic recession. Meanwhile, unemployment remains high at 9 percent despite recent job gains in the last two months. States in which chemical manufacturing is concentrated represent some of the hardest hit areas. For example, California's unemployment rate at the end of 2010 was 12.5%. Michigan – where SOCMA has a number of manufacturing members, most of which are small companies but which pay competitive wages – is not far behind at 11.7%. Missouri follows at 9.5%, New Jersey at 9.2%, and Texas at 8.3%.[3] SOCMA members from most of these states wrote to their Representatives last Congress asking you to support the current CFATS program and oppose mandatory IST requirements.

D. Experts Agree IST Should Not Be Mandated

As these examples demonstrate, a "simple" reduction in hazard may not necessarily result in a reduction of overall risk, and a poorly constructed or incomplete analysis could result in a "safer" alternative producing more harm than good. That is why government agencies and experts who

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[2] House Committee on Energy and Commerce, Report No. 111-205, pt. 2, at 48 (Oct. 23, 2009).

[3] U.S. Bureau of Labor Statistics, February 2011.

really understand inherent safety have consistently opposed giving government the power to mandate it. This includes:

- Neal Langerman, representing the American Chemical Society – the minority's own technical witness at the Homeland Security Committee hearing in June of 2009.[4]

- Sam Mannan, Director of the Mary Kay O'Connor Process Safety Center at Texas A&M University, in testimony before the Homeland Security Committee on December 12, 2007.[5]

- Dennis Hendershot, testifying on behalf of the Center for Chemical Process Safety before the Senate Environment & Public Works Committee on June 21, 2006.[6]

It is likewise instructive that the state of New Jersey, whose chemical facility security program is regularly contrasted with the CFATS program, only requires consideration of IST – *it does not require facilities to implement it*. Congress should not require DHS to do what all these experts have concluded is unwise, and what it is unwilling to do directly when the public is picking up the tab.

E. Conditioning the IST Mandate Does Not Solve the Problem

SOCMA is aware that last year's House bill would only have allowed DHS to impose mandatory on Tier 1 and 2 facilities when it could make various findings about feasibility, cost impacts and risk transfers. But that approach does not address our fundamental objection to the concept, which is that it would take IST decisions away from the process safety experts who know their

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[4] See http://chsdemocrats.house.gov/SiteDocuments/20090616103505-95857.pdf, p.7: In conclusion, the existing regulatory structure, under the U.S. EPA Risk Management program and the U.S. OSHA Process Safety Management standard, provide strong incentives to examine and implement IST. These programs work in natural conjunction with Homeland Security's mandate to enhance infrastructure security. The provisions of the Chemical Facility Antiterrorism Act of 2006 provide a sufficient legislative framework for this purpose. The most effective steps to further infrastructure protections will likely include incentives, rather than new regulations.

[5] See http://chsdemocrats.house.gov/SiteDocuments/20071212094415-39931.doc, Dr. Mannan's testimony, pp. 6-7: [I]n developing inherently safer technologies, there are significant technical challenges that require research and development efforts. These challenges make regulation of inherent safety very difficult. . . . Instead of prescriptive requirements for inherently safer technology and approaches, facilities should be allowed the flexibility of achieving a manageable level of risk using a combination of safety and security options. . . . Over the past 10-15 years, and more so after 9/11, consideration of Inherently Safer Technology (IST) options and approaches has effectively become part of industry standards, with the experts and persons with know-how assessing and implementing inherently safer options, without prescriptive regulations that carry risks (both as trumping other tools or potentially shifting risk). A better approach for applying IST in security is by allowing the companies to assess IST as part of their overall safety, security and environmental operations and therefore, cannot be prescriptive.

[6] See http://epw.senate.gov/109th/Hendershot_Testimony.pdf, at 4-8, esp. 5-6: There are tens of thousands of chemical products manufactured, most of them by unique and specialized processes. The real experts on these technologies, and on the hazards associated with the technology, are the people who invent the processes and run the plants. In many cases they have spent entire careers understanding the chemistry, hazards, and processes. They are in the best position to understand the best choices, rather than a regulator or bureaucrat with, at best, a passing knowledge of the technology.

own processes the best and would allow their judgments to be second-guessed by busy government officials sitting miles away reviewing documents. While these officials may be sincerely trying to do their best, we simply do not trust that their judgments will be better than ours. We also fear the prospect of liability if a "safer" process or chemical that one of our member companies is compelled to use ends up causing an accident or some other harm. Will the federal government indemnify facilities in the cases where it overrules their judgments regarding inherent safety? And even if a facility ultimately succeeds in persuading DHS to allow it to retain its proposed approach, that process will inevitably have costs in time and resources.

Preceding all these concerns, moreover, is an even more basic one: no one knows how to compare the "inherent safety" of two processes. Here is what the experts have told Congress:

- I do not believe that the science currently exists to quantify inherent safety. . . . The first challenge is simply to measure the degree of inherent safety in a way that allows comparisons of alternative designs…[7]

- Inherently safer design is not a specific technology or set of tools and activities at this point in its development. . . . Current books and other literature on inherently safer design… describe a design philosophy and give examples of implementation, but do not describe a methodology.[8]

- While scientists and engineers have made great strides in understanding the impacts of industrial processes and products over the past several decades, there is still no guaranteed formula for developing inherently safer production processes.[9]

The experts at the National Research Council concluded recently: "Inherently safer chemistry… offers the potential for improved safety at chemical facilities. While applications show promise and have found use within the chemical industry, these applications at present are still quite limited in scope."[10]

While it may be feasible to develop a technical consensus methodology for measuring and comparing inherent safety, none exists at present. Before Congress and the Administration could even consider mandating IST implementation, they would need to know that methodologies exist to compare various alternatives from the standpoint of inherent safety. As discussed above, DHS has launched a major effort to develop a methodology for comparing the inherent safety of two or more processes. SOCMA members and staff have been participating in this effort and cautiously support it. It is too early to tell, however, how successful it will be. Congress should avoid legislating in this area while that process is still ongoing.

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[7] Testimony of Sam Mannan, supra note 5, at 6.

[8] Testimony of Dennis Hendershot, supra note 6, at 1-2.

[9] Testimony of Neal Langerman, supra note 4, at 6-7.

[10] National Research Council, Board on Chemical Sciences & Technology, Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities (2006), at 106.

IV. Conclusion

The many small and large chemical manufacturers that employ thousands of employees in key manufacturing states such as Michigan, Missouri, Texas, and New Jersey stand to lose greatly should an IST provision be included in any legislation that advances this Congress. It is a wonder why IST proponents still support such a provision when there is so much uncertainty about the concept and how DHS could apply it -- and during a historic economic recession in which our nation's unemployment rate still wavers around 9%. Mandating inherently safer technology as a security measure will inevitably create negative unintended consequences, and Congress should not require DHS to do so. Rather, SOCMA supports chemical site security standards that are risk-based, realistic, and not subject to change in any given year.

As the House takes up the issue of chemical security anew in the 112th Congress, SOCMA asks that you act with the same bipartisanship that the House and Senate demonstrated in 2006 in the process that led to the creation of CFATS, and support legislation that would extend authorization of existing chemical facility security standards for three or more years.

I appreciate this opportunity to submit for the record the Association's views on these important issues.

Sincerely,

Lawrence Sloan
President and CEO, SOCMA

cc. House Committee on Homeland Security

October 17, 2013

VIA EMAIL TO EO.chemical@hq.dhs.gov

The Honorable Caitlin Durkovich
The Honorable David Michaels
The Honorable Mathy Stanislaus
Tri-Chairs
Chemical Facility Safety & Security Working Group
EO.chemical@hq.dhs.gov

Re: Comments on Implementation of Executive Order 13650, "Improving Chemical Facility Safety & Security"

Dear Sirs and Madam:

The Society of Chemical Manufacturers and Affiliates (SOCMA) is pleased to present comments in response to the September 24 announcement "Executive Order 13650 Listening Session." SOCMA had intended to present oral comments at the October 1, 2013, listening session announced by that email, and may do so at a future listening session. Given the short time frames established in the Executive Order (EO), however, and with the reopening today of the federal government, SOCMA is filing these written comments as provided for in the announcement.

SOCMA is the leading trade association representing the specialty/batch chemical industry. SOCMA has 200 member companies employing more than 100,000 workers across the country and producing some 50,000 products. More than 80 percent of SOCMA's active members are small businesses. All SOCMA members are required to implement ChemStewards®, a comprehensive environmental, health, safety and security management program. All SOCMA member facilities are subject to OSHA regulation; virtually all of them are subject to EPA regulation, and a substantial number are subject to the CFATS program. SOCMA members, therefore, have a very great interest in the matters addressed by the EO.

SOCMA shares the sorrow that has been expressed nationwide over the tragic loss of life in the West Fertilizer Company explosion. We also share the desire to make sure federal, state and local agencies – and industry – take appropriate steps to prevent future such incidents, including avoiding needless loss of life among first responders.

The Chemical Safety & Hazard Identification Board (CSB), Congressional committees and numerous other entities have conducted evaluations of what went wrong at West, and their conclusions, even provisional, show numerous opportunities for improvement at the local, state and federal levels. The EO presents a good opportunity to take stock of the current web of applicable federal laws and rules and their interaction with state and local authorities.

SOCMA's comments are organized by the sections of the EO. We begin, however, by highlighting three overarching themes common to all or most of our more specific comments.

Overarching Observations

1. *Maximize stakeholder involvement.* At multiple junctures, the EO charges Working Group member agencies with developing programs that are to include "stakeholder outreach," (e.g., § 4(a)) or that are intended to enable agencies and chemical facility owners and operators "to work together" (e.g., § 3(a)). SOCMA was disappointed, however, to see that the EO does not require Working Group agencies to involve stakeholders in developing the various plans, pilot programs, assessments and other recommendations that it calls for (except in Section 7). The listening session originally scheduled for October 1, and the associated invitation for comments, was a start, but not much more. The Working Group has not presented any draft proposals or thought starters, so we are left simply to comment on the EO itself. The "listening session" label also doesn't offer much promise of dialogue. Rather, members of stakeholder groups were given five minutes to take shots in the dark at what the Working Group may have in mind. This opportunity came two-thirds of the way through the 90-day limit the EO set for many of the required recommendations – so presumably the Working Group agencies are quite far along already in developing them.

SOCMA does not mean to denigrate this opportunity to provide input, but we strongly urge the Working Group, hereafter, to involve stakeholders by (i) inviting them to genuine discussions of the issues and potential solutions, and (ii) seeking their views on proposed recommendations while those views can still have a meaningful effect. Perhaps the delay caused by the shutdown will now enable that sort of involvement.

2. *Make the most of existing law.* At the EO intimates, the issues it addresses are already subject to a complex web of statutes, regulations and programs administered by multiple federal agencies. While the EO calls for a dozen or more proposals for changes in, or expansions of, those authorities, the Working Group's first baseline task ought to be to determine whether and to what extent those existing authorities are being fully implemented and complied with. Simply put, there is no point creating new law if people aren't doing what existing authorities require. Creating additional requirements will likely only further diminish such entities' overall compliance rates. This will be especially true if Working Group agencies are not given additional compliance assurance resources – which almost certainly will not occur, given the current budget climate.

As discussed more specifically in several instances below, existing programs – had they been fully implemented – could likely have prevented the West tragedy. It is also likely that, to the extent that "outlier" companies like West Fertilizer Co. do not comply with existing law, they will not comply with new or expanded authorities either. For both reasons, we submit that Working Group agencies should focus on the hard questions of how they maximize compliance with current programs before they turn to the more attractive questions of what new issues or activities they would like to regulate.

3. *Focus on the programs most appropriate to the task.* It is understandably tempting, especially if one is a Congressional committee chairman, to think that the authorities at one's disposal are – or should be – the solution to a given problem. Yet, it is crucial to focus on which authority is actually the one that Congress intended to address an issue. This is especially important in an area, such as chemical facility safety and security, where so many programs are applicable to the same substances or activities. For example, if the essence of a problem is a workplace safety issue, we need to focus on workplace safety programs and not try to solve that problem with a program – like chemical facility security – that was not originally designed to address that problem.

In this connection, SOCMA commends Assistant Administrator Mathy Stanislaus for having the temerity to say expressly, as he did this August, that EPA will not use the Clean Air Act Section 112(r)(1) General Duty Clause to address chemical facility security.[1] That is a good example of not misapplying a tool to a task for which it was not intended.

Section 3 – "Improving Operational Coordination with State, Local, and Tribal Partners"

SOCMA has two comments responsive to Section 3:

EPCRA Revitalization. SOCMA feels strongly that federal, state and local government agencies should focus on making their existing interrelationships work as intended before they start coming up with additional policy, regulation, or standards.

This effort should start with revitalizing the Emergency Planning & Community Right-to-Know Act (EPCRA), which is all about state and local emergency response planning and coordination, supported by federal training and grants. While the emergency planning and notification provisions of EPCRA (subchapter I) were only triggered in the case of West Fertilizer by its storage of ammonia, the EPCRA requirements regarding material safety data sheets (MSDS) and chemical inventory forms (subchapter II) would have applied to its storage of ammonium nitrate (AN). Submission of those forms should have put the Local Emergency Planning Committee (LEPC) for West and the West volunteer fire department on notice of the hazards associated with that storage – and the local emergency plan should have given the fire department procedures for safely responding to a fire involving it.

EPCRA did not perform as intended at West:

- The CSB has found the West facility had supplied a Tier II inventory form with the LEPC last year under EPCRA Section 312[2] -- and yet the fire department's volunteers still did not appreciate the risks of a fire involving such large quantities of AN stored in such a manner.
- It has also been reported that the county judge listed with the State Emergency Response Commission (SERC) as being the Chairman of the local LEPC is on record stating he had never heard of any LEPC in his county or of it having any meetings.[3]

EPCRA dates back to the 1986 Superfund amendments, and the rules under it were promulgated in the 1987-1990 timeframe. Unfortunately, it seems likely that the entities and processes it established a quarter-century ago have withered away in a great many states and localities. EPCRA presents the single greatest opportunity to drive chemical emergency risk reduction nationally because it puts local residents in every jurisdiction in a position to oversee and raise questions about emergency planning for hazardous chemicals. In effect, it deputizes community members to facilitate and implement federal emergency planning goals. Unlike the other statutory programs encompassed within the EO, EPCRA does not rely on an over-extended cadre of EPA, OSHA or DHS inspectors, but leverages the power of local communities.

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[1] *See* letter from Mathy Stanislaus to Congressman Mike Pompeo (August 1, 2013), Enclosure at 3 (response to question 5).

[2] CSB, "Preliminary Findings of the U.S. Chemical Safety Board from its Investigation of the West Fertilizer Explosion and Fire," at 4, available at http://www.csb.gov/assets/1/19/West_Preliminary_Findings.pdf.

[3] Bryan Haywood, "The lost art of preplanning and the role of the Local Emergency Planning Committee (LEPC)," available at http://www.safteng.net/index.php?option=com_content&view=article&id=2675&Itemid=178.

For all these reasons, it makes great sense for EPCRA revitalization to be a key element of the plan required under Section 3(a) of the EO. In several places, that section presumes the existence and effective functioning of LEPCs and SERCs (e.g., § 3(a)(iii)), but that presumption appears literally to be presumptuous, given the apparent state of SERC/LEPC functionality.

In his testimony on the West disaster, chemical process safety expert Dr. Sam Mannan made the same points:

> I believe that EPCRA Sections 301-303 provide a systematic framework for coordination of hazard information, prevention programs, and emergency planning and response involving the federal government, state emergency response commissions (SERC) and the local emergency planning committees (LEPC). However, because of a lack of systematic funding and operational capability, most LEPC's are dysfunctional or exist in name only. Some further examination into better communication between the federal and state partners is needed. I urge Congress to look into ways to solve this problem and utilize the LEPC framework in an effective manner.[4]

As first steps, therefore, Working Group agencies should declare they will reach out (i) to states to ensure the existence of functioning SERCS, and (ii) to SERCs, to ensure the existence of functioning LEPCs. This latter step could be time- and resource-intensive, but other elements of the plan required by Section 3(a) are likely never to germinate if the soil for them is not prepared.

EPCRA revitalization should also be included in the options required under EO Section 6(a)(i), and Working Group agencies should condition or qualify any recommendations under Sections 6(c)-(e) (regarding the Process Safety Management (PSM), Risk Management Program (RMP) and Chemical Facility Anti-Terrorism Standards (CFATS) rules) until some of this work has been done.

Information Protection. Much concern has been expressed within industry about Section 3(a)(vii), which says Working Group agencies will "examine opportunities to improve public access to information about chemical facility risks . . . ." SOCMA was reassured to see that sentence continue: "consistent with national security needs and appropriate protection of confidential business information (CBI)." We are confidently optimistic that the administration does not intend to roll back the CFATS rule's chemical-terrorism vulnerability (CVI) program or generally applicable CBI protections, particularly since both are required by statute.[5] We assume rather that the Administration is talking about generalized information, not information about individual facilities. It may be that the Working Group can come up with something here – SOCMA is curious to see.

SOCMA has the same comment regarding "the feasibility of sharing CFATS data with SERCs, TEPCs and LEPCs on a categorical basis" under Section 3(c). We are not sure what that means, or how useful such general data would be once one redacts any CVI and CBI. Again, we are open to evaluating what DHS recommends here.

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[4] Prepared testimony of Sam Mannan, Director, Mary Kay O'Connor Process Safety Center, Texas A&M University, before the Senate Committee on Environment & Public Works, 113th Cong., 1st. Sess. (June 27, 2013), at 9.

[5] *See* Pub. L. No. 109–295, title V, § 550(c), 6 U.S.C. § 121 note (CVI); 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905 (CBI). SOCMA was pleased that the CFATS statute cited in the previous sentence was reauthorized Section 131 of H.R. 2775, the bill reopening the Federal government.

Section 4 – "Enhanced Federal Coordination"

General. SOCMA also strongly supports the federal family coordinating its own databases and programs before it starts working on new policy. We are glad, for example, that DHS has turned back to the task of matching up the list of potential CFATS facilities with the list of RMP facilities.[6]

We believe another useful step would be to have Working Group agencies, on a regional basis, sit down periodically with whatever GIS or other tools they have at their disposal to see whether they can identify facilities that would seem to warrant regulation but are not "known" to any of them, or have not been inspected by any agency in years. In other words, regional offices should try to find some facilities that no one has inspected and could be potential "outliers," rather than revisiting the usual suspects.

Chemical Safety Board. SOCMA is particularly glad to see a focus on reevaluating the memoranda of understanding (MOUs) the CSB has with various agencies. SOCMA strongly supports the CSB and the role it plays in dispassionately understanding the cause of chemical accidents.

SOCMA is very concerned about problems that two Working Group agencies are causing the CSB:[7]

- **Site access/evidence preservation.** The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF), working with the Texas State Fire Marshal's Office, physically excluded CSB staff from the West Fertilizer site for almost three weeks. By the time CSB staff were granted access, much of the site was irremediably spoiled. Other evidence had been removed from the site and, as of last month, still had not been provided to CSB staff. Witnesses interviewed by the CSB were detained by ATF agents. Chairman Rafael Moure-Eraso's letter to Senator Barbara Boxer describes the problem in graphic detail.[8] CSB does not need nor, so far as we understand, want to be in charge of a site the way the National Transportation Safety Board would be – but CSB needs to be granted access at the outset, while the evidence is still is fresh. This access should be granted even when criminal investigations are ongoing. Criminal investigative agencies must develop protocols that enable them and the CSB to work side-by-side.
- **Witness interview transcripts.** On behalf of EPA, the Justice Department has issued grand jury subpoenas to CSB seeking transcripts of 119 CSB witness interviews to assist DOJ and EPA in a criminal investigation of the 2012 explosion at Chevron's Richmond, California refinery.[9] More recently, CSB has received similar subpoenas in connection with EPA criminal investigations in Ohio and West Virginia. SOCMA opposes such access. The job of the CSB is to find facts. It is elementary that witnesses will not be completely forthcoming to CSB if they fear the statements they make may be provided to grand juries. EPA and other criminal investigative entities are and should remain free to interview people themselves, but they should not be allowed to frustrate CSB's mission by taking advantage of its work.

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[6] We appreciate DHS's assurance that it will double-check future letters to potentially noncompliant CFATS facilities before it sends them out to ensure that they do not go again to facilities that previously submitted Top-Screens.

[7] Both problems are discussed, and supported by additional links, in Fred Hosier, "Promoting safety vs. punishing violators: A tale of 2 federal agencies," available at http://www.safetynewsalert.com/promoting-safety-vs-punishing-violators-a-tale-of-2-federal-agencies/.

[8] Letter from Chairman Rafael Moure-Eraso to Senator Barbara Boxer (May 17, 2013), at 4-6, available at http://www.scribd.com/doc/143304980/Chemical-Safety-Board-Response-to-Sen-Barbara-Boxer-in-2013.

[9] Pete Yost, "Government agencies at odds in probe of fire at Chevron's Richmond refinery," Contra Costa Times (Aug. 28, 2013), available at http://www.contracostatimes.com/news/ci_23956660/government-agencies-at-odds-probe-fire-at-chevrons.

Both of these issues can and should be addressed in new MOUs. To maximize coordination and to minimize difficulties from CSB's perspective, there should be a single standardized MOU that could then be adapted for specific agencies.

Section 5 – "Enhanced Information Collection and Sharing"

As noted above, SOCMA believes it would be useful for Working Group agencies, on a regional basis, to compare information in an effort to identify facilities that would seem to warrant regulation but are not "known" to any of them, or have not been inspected by any of the agencies in recent years.

Section 6 – "Policy, Regulation, and Standards Modernization"

This section of the EO has caused great anxiety within industry. As an initial matter, SOCMA reiterates that Working Group agencies should:

- Focus on making EPCRA function as Congress intended; and,
- Make sure other existing rules are being enforced. SOCMA is pleased OSHA initiated enforcement action against West Fertilizer Co. on October 9 based on violations of the explosives and blasting agents standard, among others. We are curious, however, why these fairly blatant violations would not have been observed in the 1985 OSHA inspection.

SOCMA will respond to any specific proposals under this section if and when they emerge. Our only observation regarding Section 6 at this point is to note that the issue of reactives, addressed implicitly in Section 6(c) (RMP/PSM) and explicitly in Section 6(d) (CFATS), is highly complex and dependent upon the circumstances in which a chemical is stored, transported and used. Before Working Group agencies offer proposals to address (RMP & CFATS) or further address (PSM) reactives, SOCMA urges the agencies to consider the value of a database of reactive chemical testing data. SOCMA, the American Chemistry Council and the National Institute of Standards & Technology (NIST) discussed the concept in the 1990s and again, at the encouragement of the CSB,[10] in the last decade. Under this concept, companies would deposit the results of tests they had conducted on various proposed products or intermediates into a publicly-available database so other companies could get the benefit of that work. A number of issues raised by the proposal would need to be worked out, most notably, how to limit the potential liability of submitters, but also including the possible role of one or more academic institutions as the host of the database. Still, such a database could be of greater utility to a broader universe of entities than any new regulatory approach, and could be established more quickly and at lower cost to the federal government.

Section 7 – "Identification of Best Practices"

SOCMA is pleased the EO does not talk about "inherent safety" in the context of regulations or policy (i.e., Section 6), but here, in the context of sharing information. SOCMA has previously explained at length how experts in the field are unanimous in opposing the idea of regulating inherent safety; we attach legislative testimony that compiles such statements and explains why.[11]

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[10] CSB, Report No. 2001-01-H, *Improving Reactive Hazard Management* (Oct. 17, 2002), at 91-93.

[11] *See* testimony of Lawrence Sloan, President and CEO of SOCMA, before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies of the House Committee on Homeland Security, 112th Cong.,1st Sess. (Feb. 11, 2011), at 5-10.

SOCMA supports the approach taken by Section 7 of the EO: to invite facility owners and operators (and others) to identify and share successes to date and best practices for reducing safety and security risks.[12] At the most recent Chemical Security Summit, which DHS and SOCMA sponsored:

- A representative of the Dow Chemical Company described:
  - the inherent safety analysis that all new capital projects undergo at Dow;
  - examples of ways that Dow has reduced the inherent hazards of processes involving methyl isocyanate, phosgene, acrolein, ethylene oxide and chlorine; and
  - a new process, with a new catalyst, that allows the process to operate at lower temperatures and pressures, and which Dow requires its contract manufacturers to employ.
- A representative of W.R. Grace described how Grace has:
  - reformulated a process to avoid generating a CFATS chemical of interest, at the same time improving product performance, lowering raw material costs, and reducing the inherent hazard of the process;
  - doubled the size of certain containers to make them harder to steal; and
  - connected a storage bunker to a process by hard pipe to avoid having to move containers.

SOCMA would support an ongoing Working Group effort to collect and publicize such examples more centrally and visibly. To begin that effort, DHS could canvas the more than 3,000 facilities that have made process changes to avoid being regulated under CFATS to see if the facilities could provide publicly-shareable examples and data on what they did.

* * *

SOCMA appreciates this opportunity to provide input into the Working Group's efforts to implement EO 13650. We look forward to future opportunities, ideally in a more real-time, interactive fashion.

If you have any questions or comments on the foregoing, please feel free to contact me at 202-721-4198 or oneale@socma.com.

Sincerely,

C. Elizabeth O'Neal

C. Elizabeth O'Neal
Senior Manager, Government Relations

Attachment

[12] See "Risk Reduction Practices" on the agenda for July 10, available here: https://www.dhs.gov/sites/default/files/publications/CS%20Preliminary%20Agenda_2013_vrs8d.pdf.

Brooks, Becky

From: Andriy Shvab <AShvab@afpm.org>
Sent: Friday, March 28, 2014 11:26 AM
To: Stanislaus, Mathy
Subject: Thank you
Attachments: Mathy Stanislaus.pdf

Mr. Stanislaus,

Thank you for speaking at AFPM's 2014 Environmental Committee Meeting. Please find attached a thank you note from David Friedman.

Respectfully,

Andriy Shvab
Regulatory Affairs Coordinator
Regulatory Affairs

American
Fuel & Petrochemical
Manufacturers
1667 K Street NW
Suite 700
Washington, DC 20006
202.457.0480 office
[redacted] direct
202.457.0486 fax

ashvab@afpm.org
Learn more about AFPM at afpm.org

American
Fuel & Petrochemical
Manufacturers

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 office
202.457.0486 fax
afpm.org

March 24, 2014

Mathy Stanislaus
U.S. EPA
1310 L Street NW
Washington, DC 20005-4113

Dear Mr. Stanislaus,

On behalf of AFPM and the AFPM Environmental Committee, I would like to thank you for speaking at AFPM's 2014 Environmental Committee Meeting. Your participation provided beneficial information to committee members and helped make the meeting a great success! We look forward to working with you again in the future.

Sincerely,

David Friedman

Brooks, Becky

From: Jennifer Gibson <JGibson@NACD.com>
Sent: Friday, May 17, 2013 12:32 PM
To: Stanislaus, Mathy
Subject: NACD Meeting - Thank You and Follow Up
Attachments: image001.jpg

Dear Assistant Administrator Stanislaus,

Thank you so much for meeting with our group from the National Association of Chemical Distributors (NACD) last week. We really appreciate the generous amount of time that you gave to us and the productive dialogue that we had.

We were pleased to present information on Responsible Distribution to you and would be happy to return to EPA at any time to discuss the program with you and other members of your team. We are particularly interested in ways that we can use Responsible Distribution to streamline and enhance regulatory compliance. You can find more information on the program at www.nacd.com/dist_process.

We also stand ready to help spread the word about EPA's regulatory initiatives and priorities through our electronic and print publications, our national and regional conferences, and our members' relationships with their 750,000+ customers. For example, if there is a topic that EPA would like to emphasize, we would be happy to include an article in our *Chemical Distributor* magazine or facilitate a webinar for you to directly reach our members.

EPA's accident prevention and emergency planning regulations are among the most prominent and important regulations that apply to chemical distributors. We look forward to working with you and your team on sharing best practices and other initiatives in these critical areas.

Sincerely,

Jennifer C. Gibson
Vice President, Regulatory Affairs

1555 Wilson Blvd., Suite 700
Arlington, VA 22209
703.527.6223 x 3047 - Phone
[redacted] Direct
jgibson@nacd.com

LinkedIn

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